85-875

Supreme Court, U.S.
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No. .....

In The
Supreme Court of the United States
October Term, 1985

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

LUIGI MANOCCHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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State of Rhode Island

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QUESTION PRESENTED FOR REVIEW

Whether the Rhode Island Supreme Court erred in holding that limitation of cross-examination regarding one aspect of the memory and perception of the prosecution's chief witness constituted *per se* reversible error pursuant to this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974)?

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Now comes the State of Rhode Island and Providence Plantations, by its attorney, and prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review said court's erroneous decision of a federal constitutional question.

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OPINION OF THE COURT BELOW

The case at bar was decided by the Rhode Island Supreme Court in a decision reported as *State v. Luigi Manocchio*, 496 A.2d 931 (R.I. 1985). The opinion is reprinted in full at pages 1 through 10 of the appendix hereto.

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STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Rhode Island entered on August 6, 1985. A petition to reargue was timely filed on August 9, 1985 and denied by the court in an order dated September 19, 1985. The petition to reargue is set out in full at pages 11 through 18 of the appendix hereto. The order denying reargument is set out at appendix page 19.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) and by the Rules of the Supreme Court of the United States R. 17.1(b)(c).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following statutory and constitutional provisions involved in this case are set out beginning at page 20 of the appendix hereto:

U.S. Const. Amend. VI;

U.S. Const. Amend. XIV, § 1;

R.I. Const. Art. I, § 10

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STATEMENT OF THE CASE

This case involves a gangland-style murder that occurred in the City of Providence, Rhode Island, on April 20, 1968. The victims were Rudolph Marfeo and Anthony Melei. Marfeo was allegedly killed for interfering with the underground gambling operation of Raymond L.S. Patriarca. Patriarca, Maurice "Pro" Lerner, and three other co-conspirators were convicted in 1969. *See State v. Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973); *State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973). Luigi Manocchio, Respondent herein, absented himself from the jurisdiction for some ten years and was therefore unavailable for trial. *State v. Manocchio*, 448 A.2d 761, 763 (R.I. 1982). He was eventually tried and convicted by a Providence County Superior Court jury of one count of conspiracy to murder and two counts of accessory to murder.

Manocchio appealed his conviction to the Rhode Island Supreme Court. That court reversed the conviction, holding that the trial justice had impermissibly limited cross-

examination of the state's principal witness. The state court's opinion is set out at pages 1-10 of petitioner's appendix.

1. *Factual Background* The principal prosecution witness in this case was John "Red" Kelley. Mr. Kelley testified that he had assisted Manocchio and the other defendants in planning the murders of Marfeo and Melei. Manocchio and his confederates knew that Marfeo and Melei did their weekly shopping at Panone's Market on Pocasset Avenue in Providence. Kelley was from Massachusetts and was not a familiar figure in the Providence neighborhood. He was therefore chosen to "case" the market and to prepare an escape route for the gunmen.

Kelley testified regarding several meetings that took place in preparation for the killings. Kelley's testimony was extensive and detailed. He admitted that at prior related trials he had told lies. The trial record is replete with statements by Kelley that he could not recollect certain points. In addition, his status as a government-supported informant was placed before the jury. Despite the obvious frailties of this witness, the core of Kelley's revelations regarding Manocchio's guilt could not be shaken. Kelley offered a coherent and consistent account of the planning, preparation and execution of the Marfeo-Melei murders. This testimony linked Manocchio inextricably to the murders, resulting in verdicts of guilty on all charges.

2. *Facts regarding cross-examination.* During a pretrial voir dire, witness Kelley stated that he had been diagnosed as having "premature Alzheimer's disease." Later at the trial, defense counsel attempted on cross-examination of witness Kelley to explore this issue. The trial jus-

tice sustained the prosecutor's objections to questions regarding Alzheimer's disease. On appeal, the Rhode Island Supreme Court concluded that this limitation of cross-examination violated Manocchio's Sixth Amendment right of confrontation. The State argued first that as a lay witness, Kelley was clearly not competent to provide the jury with an explanation of the nature or effects of Alzheimer's disease. Even assuming that Kelley could properly recount the diagnosis, he could provide the jury with no substantive assistance in measuring his perception or memory. Moreover, the State argued, defendant at trial had ample opportunity to expose Kelley's myriad weaknesses to the jury. Kelley's trial testimony is replete with demonstrations that his memory was flawed. By observing the witness and by listening to his repeated assertions of absence of memory, the jury was fully able to recognize that this witness had a recollection problem. Despite these flaws, the jury chose to believe this witness. Merely attaching a scientific moniker—without expert or diagnostic testimony—to the problem could scarcely assist the jury in evaluating the witness.

In sum, the State argued that the limitation on cross-examination—if erroneous—resulted in no prejudice to defendant. The Rhode Island Supreme Court rejected the State's argument. The court chose instead to apply a rule of *per se* reversal, purportedly based upon this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974). The Petitioner submits that the application of a *per se* reversal rule, on the facts of this case, constitutes error of constitutional magnitude requiring reversal by this Court. Petitioner further submits that the issues in this case are similar to those presented in *Delaware v. van Arsdall*, No.

84-1279 (U.S. cert. granted July 2, 1985). Petitioner accordingly prays for a writ of certiorari to the Rhode Island Supreme Court to review that court's judgment.

ARGUMENT

Petitioner submits that the Rhode Island Supreme Court erred in applying a *per se* reversal rule based upon *Davis v. Alaska*, 415 U.S. 308 (1974). Instead, Petitioner submits, the court should have reviewed the trial record in its entirety to determine whether, on the totality of the circumstances, the defendant received a fair trial. Moreover, this Court has already granted certiorari to review application of the *per se* error rule in *Delaware v. Van Arsdall*, No. 84-1279 (U.S. cert-granted July 2, 1985). Petitioner submits that the decision of that case will likely be controlling.[1] Accordingly, certiorari in this case should be granted in order to apply this court's decision in *van Arsdall* to the instant case.

THE RHODE ISLAND SUPREME COURT ERRED IN APPLYING A PER SE ERROR RULE UNDER DAVIS v. ALASKA.

In reversing Manocchio's conviction, the Rhode Island Supreme Court applied a *per se* rule of reversal. Pet. App.

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[1] In determining whether to Petition for Certiorari in this case, Petitioner reviewed the briefs filed in *van Arsdall*. There are marked similarities between the issues involved in *van Arsdall* and the instant petition. Petitioner respectfully addresses this Court's particular attention to the brief filed on behalf of the United States as Amicus Curiae in *van Arsdall*. The United States has presented a cogent and well-reasoned argument in favor of requiring a prejudice analysis in cases such as the one at bar.

at 7. The Rhode Island court purported to derive this rule from the decision of this Court in *Davis v. Alaska*, 415 U.S. 308 (1974).[2] In *Davis* a state trial judge had precluded a defendant from cross-examining a prosecution witness with regard to the witness' prior record of juvenile convictions. Although recognizing the state's significant interest in the confidentiality of juvenile court records, this Court gave superior importance to the defendant's right to confront his accusers as guaranteed by the Sixth Amendment. This right of confrontation, the Court reasoned in *Davis*, includes within it the right to conduct an effective cross-examination. In recognizing the significance of cross-examination as a component of the defendant's Sixth Amendment right, this Court stated:

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[2] The Rhode Island Supreme Court held that the limitation of cross-examination in this case violated the Sixth Amendment as well as Article I, Section 10, of the Rhode Island Constitution. Pet. App. 6. In reaching this result, the court declined to base its holding on an adequate and independent state law footing. *Cf State v. von Bulow*, 475 A.2d 995 (1984), *cert. denied*, 105 S.Ct. 233 (1984) (announcing adequate and independent state law basis for limitation upon warrantless searches and seizures). Instead, the court in *Manocchio* noted that the state and federal constitutional provisions involved in the instant case are identical. *State v. Manocchio*, Pet. App. 6 n. 2. In its analysis of the confrontation clause issues, the court demonstrated that the state and federal issues involved are closely interwoven. Thus, pursuant to this Court's holding in *Michigan v. Long*, 103 S.Ct. 3469 (1983), it is readily apparent that the decision of the Rhode Island Supreme Court in the instant case rested primarily on federal law. As this Court stated in *Long*:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3476

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witnesses' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e. discredit, the witness.

415 U.S. at 316. This Court characterized the limitation in *Davis* as "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 355 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)). Thus, this Court in *Davis* concluded that a new trial—free of impermissible limitation upon the scope of cross-examination—was the only remedy capable of repairing the harm to the defendant's confrontation rights.

Based largely upon the reasoning in *Davis*, the Supreme Court of Rhode Island has fashioned a *per se* error doctrine that it applies whenever a trial judge impermissibly limits a defendant's cross-examination of a prosecution witness. *State v. DeBarros*, 441 A.2d 549 (1982); *State v. Freeman*, 473 A.2d 1149 (1984). The *per se* error doctrine derives from the Rhode Island Supreme Court's understanding of the Sixth Amendment confrontation clause. The court perceives cross-examination to be the most important means of effectuating a defendant's right to confront his accusers. Any limitation upon cross-examination therefore is deemed a *per se* violation of the Sixth Amendment, mandating reversal without regard to other circumstances of the trial.

The Petitioner submits that the *per se* error doctrine constitutes an erroneous extension of this Court's decision

in *Davis*. Confrontation and cross-examination are concededly important rights. Nevertheless, Petitioner submits that even in situations where a trial judge has imposed limitations upon cross-examination a proper interpretation of the Sixth Amendment requires an analysis of the totality of the circumstances to determine whether the defendant received a constitutionally fair trial. This approach—which focuses upon the trial as a whole and not merely upon one narrow dimension—comports with the analysis utilized by this Court in analogous cases involving related Sixth Amendment issues. For example, in *United States v. Agurs*, 427 U.S. 97 (1976), this Court considered whether the failure of the prosecutor to deliver unrequested materials to the defense counsel deprived the defendant of a fair trial. The information was arguably exculpatory within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court held that in reviewing such a problem, the proper approach is to determine whether the non-disclosed evidence was material to the case. The Court's analysis clearly entails a review of the entire record:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be *evaluated in the context of the entire record*. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 112-13 (emphasis added).

Applying this standard in *Agurs*, the Court found that the withheld evidence was not sufficiently material to defendant's case to warrant a new trial. More recently, in

United States v. Bagley, 105 S. Ct. 3375 (1985), this Court utilized a totality of the circumstances approach in the context of cross-examination. The prosecution in *Bagley* had withheld information that could have been used to impeach its witnesses. Although recognizing the importance of cross-examination, this Court held that the limitation upon cross-examination that resulted from the non-disclosure did not deprive the defendant of a fair trial. In reaching this conclusion the Court applied a totality of the circumstances approach and determined that the withholding of materials —and the resultant effect upon cross-examination—did not "undermine[ ] confidence in the outcome of the trial." *Id.* at 3381.

This term this Court confronts two cases involving the *per se* reversal rule. The Court has already decided *Delaware v. Fensterer*, No. 85-214 (U.S. Nov. 4, 1985). *Fensterer* is extremely similar to the case at bar. In *Fensterer*, the prosecution offered testimony from an expert witness who was incapable of remembering the basis for his opinion. The defendant argued that such a witness was incapable of cross-examination and should therefore have been precluded from testifying. This Court rejected defendant's argument. The Court noted that any limitation on defendant's cross-examination resulted not from any Court ruling but from the defect in the witness' memory. Moreover, the Court reasoned that the witness' failure of memory was plainly revealed to the jury. This factor alone constituted fertile ground for a defense attack upon the witness' opinion:

> Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory.

Id., 38 Crim. L. Rptr. at 4068. The jury in *Fensterer* could clearly observe the witness and his failure of memory. Any harm to defendant's cross-examination was therefore expiated by the weaknesses revealed in the witness' very demeanor. In summarizing the law in this area, the Court stated:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony.

Id. at 4069.

In the instant case, as in *Fensterer*, the jury was fully aware that witness Kelley suffered from a lapse of memory. A review of the trial transcript in this case reveals that Kelley responded to literally dozens of questions with statements indicating a failure of recollection. Thus, it was readily apparent to the jury—and to anyone who examined the trial transcript in its totality—that Kelley suffered a memory problem. The exact nature of the problem was never revealed to the jury. As the Petitioner argued to the Rhode Island Supreme Court, defendant sought to introduce through Kelley a medical diagnosis of Alzheimer's Disease. Under ordinary evidentiary rules it would have been erroneous to permit Kelley—a lay wit-

ness—to testify to the nature and cause of the disease.[3] Thus, the very most that the defense could have obtained through this witness was a hearsay statement that a physician had diagnosed him as suffering from the disease.

Given the substantial evidence on the record that the witness had a memory problem, it can scarcely be contended that this marginal piece of excluded information could have effected the jury. Yet, the Rhode Island Supreme Court declined to review the record in its entirety. Instead, the Court applied the *per se* reversal rule. This Court will confront this precise issue later this term in *Delaware v. van Arsdall*, No. 84-1279 (U.S. cert. granted July 2, 1985). This Court will consider whether an erroneous restriction of cross-examination requires automatic reversal without reference to whether the defendant was actually prejudiced by the error. The outcome of *van Arsdall* will likely be controlling of the instant Petition. This fact alone weighs heavily in favor of certiorari in this case. The application of a *per se* reversal rule to the facts of the instant case defies logic and conflicts with a reasoned review of the record in its entirety. This Court should therefore grant certiorari to review the judgment of the Rhode Island Supreme Court.

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[3] The Rhode Island Supreme Court, for example, has specifically held that testimony regarding medical diagnoses and conditions should normally come only from a qualified expert who can testify to a reasonable degree of medical certainty. *E.g., State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. Bowden*, 473 A.2d 275 (R.I. 1984). There is nothing in the record to suggest that Kelley was qualified to testify regarding an Alzheimer diagnosis. It is therefore difficult to comprehend how defense counsel could have intended to introduce such evidence through this witness. The Rhode Island Supreme Court seems, however, to have based its decision largely upon the premise that this witness could have offered detailed testimony regarding the diagnosis. Petitioner is unable to offer any rational explanation for this unwarranted presumption.

CONCLUSION

The Rhode Island Supreme Court erred in applying a *per se* reversal rule in the instant case. Petitioner submits that this Court should therefore issue a writ of certiorari to review the Rhode Island Court's judgment. Alternatively, Petitioner prays that disposition of the instant petition be held in abeyance until such time as this Court decides *Delaware v. van Arsdall*, No. 84-1279, which case Petitioner submits, is likely to be controlling of the instant petition.

Respectfully submitted,

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August 6, 1985

Supreme Court
No. 84-43-C.A.

State

v.

Luigi Manocchio.

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August 6, 1985

Supreme Court
No. 84-43-C.A.

State

v.

Luigi Manocchio.

O P I N I O N

KELLEHER, J. On April 20, 1968, Rudolph Marfeo and Anthony Melei were shot to death while shopping at a Pocasset Avenue market in Providence. This appeal rep-

resents yet another chapter in the lengthy and persistent effort to bring those responsible for these murders to trial.[1] Defendant Luigi Manocchio (Manocchio) was indicted in August of 1969 on two charges of accessory before the fact and one charge of conspiracy to commit murder. He evaded arraignment and prosecution for ten years by fleeing the jurisdiction. *State v. Manocchio*, R.I. , , 448 A.2d 761, 763 (1982). Manocchio was finally arraigned on July 6, 1979, and in June of 1983 a Superior Court jury found him guilty of all three charges. Manocchio now appeals his convictions on a multitude of grounds. We reverse because we have determined that the trial justice impermissibly limited Manocchio's cross-examination of a key witness.

Melei and Marfeo were killed by two masked gunmen, allegedly in retaliation for running a gambling operation that competed with a similar enterprise run by another defendant, Raymond L. S. Patriarca (Patriarca). The state's case against all of the original defendants, including Manocchio, was based almost entirely on the testimony of participant-turned-informer John J. "Red" Kelley (Kelley). Before the grand jury that indicted the defen-

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[1] Originally, seven persons were indicted for activities connected with these murders (indictments numbered 69-767, -768, and -769 returned on August 14, 1969). In the three trials preceding this defendant's arraignment, Maurice Lerner was found guilty of first-degree murder and conspiracy to commit murder. John Rossi, Robert Fairbrothers, Raymond Patriarca, and Rudolph Sciarra were also found guilty of conspiracy but not guilty of charges of accessory before the fact. The conspiracy charge against Frank Vendituoli was dismissed, and he was found not guilty of accessory charges. *See State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973), and *State v. Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973).

dants, and again at the various trials of the various defendants, Kelley detailed a series of meetings with the other participants in the crime designed to firm up plans for the murder itself and for the subsequent getaway. Kelley's own avowed role in the crime involved reconnaissance, purchasing masks for the gunmen, preparing weapons, and planning an escape route.

At the time of Manocchio's trial, Kelley was sixty-eight years old, testifying about events that had occurred fifteen years previously. Defense counsel was therefore understandably concerned about Kelley's present ability to remember and relate accurately the circumstances surrounding Manocchio's alleged involvement in the two murders. Counsel's apprehension grew when Kelley testified in the following fashion at an identification-suppression hearing:

> "Q. Mr. Leppo [defense counsel:] Are you suffering from any disease that affects your memory?
>
> "A. Yes. Yes. [Witness starts to cry.]
>
> " * * *
>
> "Q. Would you tell us what disease you have that affects your mind and memory?
>
> "A. I have — I'm, I'm being treated for many different things, and premature Alzheimer's, I think it is.
>
> "Q. And does that affect your memory, sir?
>
> "A. Yes, it does.
>
> "Q. And does that affect your thought process?
>
> " * * *
>
> "A. It does.
>
> " * * *
>
> "Q. Has that affected your recall as to certain events?

"A. It does affect it, yes.

"Q. And how often does this happen?

"A. When I tell you I can't remember a thing, it's an honest answer."

At the conclusion of the suppression hearing, Manocchio moved to have Kelley examined for competency. The trial justice stated: "[W]e heard him testify. The Court rules as a matter of fact, after hearing this gentleman testify, he is competent.

Subsequently, at trial, Manocchio sought to explore Kelley's memory problems and mental diseases for the benefit of the jury. Each time counsel broached this subject, however, he found inquiry foreclosed when the trial justice sustained the prosecutor's objections.

"Q. [Mr. Leppo:] Now, yesterday you told us you were taken to the House of Corrections in New Bedford. Do you remember saying that yesterday?

"A. [Kelley:] I don't recollect that.

"Q. You don't recollect saying New Bedford yesterday?

"A. I don't recollect now.

"Q. Do you have a problem with your memory?

"A. Yes, I do have a problem with my memory.

"Q. And the problem with your memory is that you cannot remember saying Thursday what you said on a Wednesday, sir?

MR. LEACH [the prosecutor:] Objection, Your Honor.

THE COURT: Sustained.

"Q. Do you have a problem with your memory you cannot remember what you said to me two questions ago?

"A. Yes, I do.

"Q. So that if I were to ask you to repeat your answer as to where you went with Mr. Rico, you would have forgotten that answer?

MR. LEACH: Objection, Your Honor.

THE COURT: You may answer.

"A. That's a possibility.

"Q. So that you have difficulty with that memory?

"A. I do.

"Q. And that memory, sir, has been failing you for some period of time now, is that correct?

MR. LEACH: Objection, Your Honor.

THE COURT: Sustained.

"Q. Has that memory been failing you?

MR. LEACH: Objection, Your Honor.

THE COURT: Sustained.

"Q. How long have you suffered from that condition, Mr. Kelley?

MR. LEACH: Objection, Your Honor.

THE COURT: Sustained."

Thus, the only evidence Manocchio was allowed to place before the jury regarding Kelley's mental condition was that Kelley had a "problem" with his memory. Kelley's premature Alzheimer's disease and the "many different things" for which he had previously revealed he was being treated were never revealed to the jury. Manocchio's quandry was compounded by Kelley's only recently abandoned participation in the federal witness-protection program. Kelley had been given a new identity through the program and had been relocated to an undisclosed area. Thus,

Manocchio's only hope for acquiring information about Kelley was through the use of cross-examination.

At the conclusion of the evidence, the jury returned verdicts of guilty on all three charges. The trial justice sentenced Manocchio to a life sentence on each of the accessory counts and a term of ten years on the conspiracy count, all sentences to be served consecutively.

On appeal Manocchio raises several issues relating to alleged errors before the grand jury and at trial. We find it unnecessary, however, to inquire further than the trial justice's unwarranted restriction of defense counsel's cross-examination of Kelley on the issue of Kelley's memory deficiences and mental diseases. Manocchio argues that by so limiting his ability to cross-examine Kelley, the trial justice denied Manocchio the right to confront his accusers guaranteed by both the Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment and article I, section 10, of the Rhode Island Constitution. We agree.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."[2] Included within the rights conferred by the confrontation clause is, primarily, the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S. Ct. 1074, 1076, 13 L. Ed. 2d 934, 937 (1965). In *State v. Anthony*, R.I. , , 422 A.2d

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[2] In pertinent part the Rhode Island constitutional provision is identical.

921, 924 (1980), we observed: "It is the essence of a fair trial that reasonable latitude be given the cross-examiner." While it is true that the trial justice must exercise his or her discretion to protect a witness from questions that "harass, annoy, or humiliate the witness, or questions that are irrelevant or offer no probative value," *id.*, we have clearly endorsed the principle that this discretionary authority to limit cross-examination "comes into play [only] after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *State v. DeBarros*, R.I. , 441 A.2d 549, 552 (1982) (quoting *Springer v. United States*, 388 A.2d 846, 855 (D.C. App. 1978)).

Thus, in *DeBarros* and *State v. Freeman*, R.I. , 473 A.2d 1149 (1984), we clearly established a per se error rule where the defendant has been fully precluded from effective cross-examination on a pertinent issue. We have also relied on the per se standard where a defendant has been permitted to ask preliminary questions but has been otherwise functionally precluded from constitutionally adequate cross-examination. *State v. Parillo*, R.I. , 480 A.2d 1349, 1357 (1984). In *Freeman* defense counsel was blocked on cross-examination from eliciting from the only eyewitness to the victim's murder that at the time she gave a statement to police concerning the murder, she was in custody and under arrest. We held that because the witness's credibility

> "was the vital element in establishing the defendant's guilt, the trial justice, by totally precluding the defendant from raising and probing the issues of motive, bias, or prejudice, effectively cut off the defendant's

right to test [the witness's] credibility fully and adequately." *State v. Freeman*, R.I. at , 473 A.2d at 1154.

In *Parillo* defense counsel sought to cross-examine the sole living eyewitness to the victims' murders about a deal she allegedly made with the police in exchange for her testimony. Defense counsel was allowed to ask several preliminary questions but was then foreclosed from further substantive inquiry. We held that a defendant must be afforded "not just some cross-examination, but *sufficient* cross-examination as a matter of right." (Emphasis in original.) *State v. Parillo*, R.I. , 480 A.2d at 1359. We thus applied the per se error standard and vacated the defendant's conviction even though counsel had not been completely foreclosed from inquiry.

With these cases for guidance, we find ourselves in sharp disagreement with the state's assertion that the few preliminary questions permitted by the trial justice sufficiently apprised the jury of the state of Kelley's mental faculties. At best, we believe these questions served merely to pique the jury's curiosity, providing no basis from which to infer the nature or extent of Kelley's "problem with [his] memory." We are persuaded that the four questions posed by defense counsel and answered by Kelley do not satisfy the constitutional requirements for adequate cross-examination.

While it is true that the case presently before us does not involve the traditional impeachment areas of motive or bias, we have concluded that the rationale supporting our holdings in those cases is equally compelling with respect to cross-examination aimed at exploring competency. We have pointed out the the purpose of cross-examination

is to test for the benefit of the jury "the credibility of the witness and the truthfulness of his [or her] testimony * * *." *State v. Anthony*, R.I. at , 422 A.2d at 924. It is axiomatic that the ability of a witness to remember accurately and to relate the events in question is of crucial importance to a jury's assessment of that witness's credibility. Where counsel is able to demonstrate that through either passage of time or an intervening mental disease the witness is incapable of recollecting the events in question, or of distinguishing fact from fiction, the most essential element of the witness's value and reliability has been destroyed.

In the case presently before us, an exploration of Kelley's possible memory defects was especially warranted. When Kelley took the witness stand before the jury that convicted Manocchio, he was the only witness who could link Manocchio with the fifteen-year-old murders of Melei and Marfeo. It is readily apparent to us that Kelley's credibility was the only real issue before the jury. As the state's only witness with the ability to detail Manocchio's participation in the murders, the jury's determination of whether or not to convict him rested entirely upon its assessment of Kelley's competency and veracity.

In addition, this was at least the fourth time since the murders had occurred that Kelley had been required to relate his story under oath,[3] admitting for the first time on the eve of Manocchio's trial that all of his prior testimony had been tainted in significant respects with perjury.

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[3] Kelley testified before the grand jury that returned these indictments and at the three previous trials of the other defendants.

There was an obvious danger here that Kelley's testimony involved far more recitation than recollection.

For these reasons we find in line with our prior case law that the trial justice's limitation of cross-examination on the issue of Kelley's memory deficiences and mental diseases was clear error, violating both Manocchio's Sixth Amendment right to confront the witnesses against him and art. I, sec. 10, of the Rhode Island Constitution.

Manocchio's appeal is granted, and the judgments of conviction appealed from are vacated. The papers in this case are remanded to the Superior Court for a new trial on all counts.

The Chief Justice participated in the oral argument and in the decision of the court, but he did not participate in the publication of the formal opinion.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
PROVIDENCE, SC.

SUPREME COURT

No. 83-0043-C.A.

STATE OF RHODE ISLAND

vs.

LUIGI MANOCCHIO

MEMORANDUM IN SUPPORT OF
STATE'S PETITION TO REARGUE (R. 25)

This case was decided by the court on August 6, 1985. The Defendant's appeal was sustained and the court ordered the case remanded to Superior Court for a new trial. The State has filed a Petition to Reargue the instant case. The State recognizes that in seeking reargument a party is required to demonstrate that the court has overlooked or misapprehended some issue that was properly raised. As this court stated in *Brimbau v. Ausdale*, 120 R.I. 670, 389 A.2d 1254 (1978):

> The Supreme Court may at its discretion reexamine its own decision within a reasonable time after rendition . . . The purpose of reargument is to afford a petitioner an opportunity to point out matters presented in the briefs and relied upon in the original argument which he believes were overlooked or misapprehended by the appellate court in reviewing the case . . ." 389 A.2d at 1255.

The State recognizes that, as the petitioner in this instance, the State bears the burden of demonstrating error in this Court's opinion. *See Lapierre v. Greenwood*, 85 R.I. 484, 135, A. 2d 269 (1957); *see generally* J. Weisberger,

Rhode Island Appellate Practice § 25.1 (1985). The State respectfully submits, that in the instant case, this court's decision simply fails to address one point of major significance that was central to the State's argument. Moreover, the State submits that the so-called per se reversal rule should be reexamined at this time. Finally, the State submits that the interests of justice demand that this court address several issues that were raised by the parties but not treated in the opinion.

I. *This Court Overlooked the State's Argument.*

This court granted defendant's appeal in the instant case based upon the defendant's argument that the trial justice had impermissibly limited the scope of cross examination of the State's lead witness. The State recognizes that the trial justice sustained several of the prosecutor's objections to questions regarding the witness' memory condition. There was some indication that this witness, John Kelley, was suffering from Alzheimer's disease. Defense counsel sought, upon cross-examination of the witness, to establish the basis for the witness' difficulty with his memory. The State addressed this point at length at the oral argument of this case. The State pointed out that this witness was a lay witness. Even if the trial justice should have permitted him to recount his diagnosis—an assumption which the State in no way concedes—the witness certainly could not have described in any detail the

apparently complex medical and mental ramification of such a diagnosis.[1] Thus, the magnitude of the limitation placed upon defense counsel was not as great as this court's opinion appears to suggest.

Moreover, a review of the record demonstrates that defense counsel had ample opportunity to attack the memory of this witness. The State suggested at oral argument that the defendant was attempting to draw the inference that this witness had a faulty memory. The so-called "Alzheimer" issue was not an essential tool to this strategy. As the State pointed out, a review of the transcript clearly revealed that this witness had memory problems. This court dismissed the State's argument with the following reference:

> "[W]e find ourselves in sharp disagreement with the state's assertion that the few preliminary questions permitted by the trial justice sufficiently apprised the jury of the state of Kelley's mental faculties. At best, we believe these questions served merely to pique the jury's curiosity, providing no basis from which to infer the nature and extent of Kelley's 'problems with [his] memory.'" Id., slip op at 8.

The lapse in this reasoning is that it ignores the substantial volume of testimony in the case.

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[1] This court has held that testimony regarding medical diagnoses and conditions should normally only come from a qualified expert who can testify to a reasonable degree of medical certainty. *See State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. Bowden*, 473 A.2d 275 (R.I. 1984). There is no reason to suggest that witness Kelley was qualified to testify regarding an Alzheimer diagnosis. In light of this fact, it is difficult to comprehend how defense counsel could have hoped to introduce this information through this witness. It would appear, however, that the court's decision rests largely on this premise.

The State concedes that a mere cursory view of the evidence in this case might support the court's conclusion that defense counsel had no adequate basis for attacking Kelley's memory. This is precisely the reason for the State's repeated insistence at oral argument that the court undertake a careful reading of the transcript in this case. With all due respect, the State suggests that the court should re-examine this transcript before disposing of the instant petition. Such a reading will reveal that Kelley's own testimony was riddled with failures of memory and lapses of recollection. On literally scores of occasions Kelley responded to questions by saying that he could not remember or that his recollection was weak. (Tr. 1015-17, 1203, 1264, 1323-56).

Remarkably, this court's analysis in the August 6 opinion focuses on only four questions that were posed by defense counsel. Yet the jury that sat in this case heard this witness complain of his memory failure on dozens of occasions. The State does not often draw attention to the weaknesses of its own witnesses. These weaknessses, however, were obvious to the jury. On such a record, the State submits that defense counsel had ample ammunition for h's attack upon Kelley's memory. Despite these flaws—which were clearly revealed to the jury—the factfinder in this case chose to believe John Kelley's testimony. Consequently, this court should reconsider this case to determine whether a new trial is necessary.

II. *The Per Se Reversal Rule Should not have been Applied.*

In sustaining the instant appeal, this court relied upon the so-called "per se error" rule as described in *State v. DeBarros*, 441 A.2d 549 (R.I. 1982). The State respectfully suggests that application of that rule in the instant case was improper. As has been demonstrated in the foregoing section of this memorandum, the defendant had ample opportunity to attack the recollection of witness Kelley. This witness' memory problems were readily apparent to the jury. This court has recognized that limitations on cross-examination, even if erroneous—will be deemed cured if the defense attorney is permitted to obtain the desired information during the course of his examination. *See State v. Soto*, 477 A.2d 945 (R.I. 1984). Because the examination provided an ample basis for defendant to challenge this witness' memory, application of the per se rule is simply inappropriate.

Even if this case came within the perimeters of the per se error rule, the State respectfully suggests that this court should seriously consider abandoning the rule. The rule apparently derives from the decision of the United States Supreme Court in the celebrated case of *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The United States Supreme Court has recently implied that the rule of *Davis* is not quite so broad as originally thought. *Cf United States v. Bagley*, 105 S. Ct. 3375, 3381 (1985) (lower court erred by invoking "automatic reversal" rule where effects upon cross-examination did not deprive defendant of fair trial). Indeed, the United States Supreme Court has recently granted cer-

tiorari to determine whether the "automatic reversal" rule of Davis should be abandoned entirely. *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984), *cert. granted*, 105 S. Ct. 3552 (1985). In *Van Arsdall* the Justices will consider whether the Delaware Supreme Court improperly applied a per se reversal rule. The lower court in *Van Arsdall* held that limitation of cross-examination in the area of bias necessitates reversal on a per se basis. The United States Supreme Court has accepted review of the *Van Arsdall* case to determine whether this per se rule was proper.

Certiorari in *Van Arsdall* was granted on July 2, 1985. 105 S. Ct. 3552. It is likely that the case will be argued in the United States Supreme Court in January of 1986. The State respectfully suggests that there is an extremely high probability that the Supreme Court will reject the per se error rule applied by the Delaware Supreme Court. In view of this probability, it would seem appropriate for this court at this time to review the viability of the per se error rule as applied in this case.

III. *This Court Should Address Other Issues.*

This case involved many issues that were carefully briefed and argued by the parties. In particular, the parties addressed one issue involving alleged perjury before the grand jury and a separate issue concerning the alleged disappearance of physical evidence. These issues were carefully briefed and argued by the parties in this appeal. Moreover, they are of a nature that they are likely to arise at a retrial of this case. The State recognizes that his Court considered one issue dispositive of the within appeal. Nevertheless, the State respectfully suggests that

the interests of justice require this Court to address these additional issues at this time.

This court has previously recognized that non-dispositive issues should be treated on appeal when the issues are likely to arise on retrial. *See, e.g. State v. Lemon*, 256 A.2d 261, 264 (R.I. 1983) (when new trial granted, court may discuss other non-dispositive issues that are likely to arise again); *State v. Beulieu*, 116 R.I. 575, 359 A.2d 692 (1976) (non-dispositive issues will be discussed by court in cases where new trial has been ordered and issues may arise in future).

Only this term, in *State v. Heredia*, 493 A.2d 831 (1985), this Court reiterated its practice of addressing a non-dispositive issue that "would be required in order to provide guidance for a new trial." *Id. Heredia* is most instructive. In that case the court found a discovery issue to be dispositive and ordered a new trial based upon that ground. The defendant also raised an issue related to an irregularity that occurred before the grand jury. Defendant claimed that the trial justice should have dismissed the indictment based upon the irregularity. Recognizing that this issue would be raised anew on remand, this court discussed the grand jury issue in order to provide guidance to the trial justice. The State agrees with this court's general inclination not to decide issues that are not essential to disposition of the appeal. On the other hand, in cases such as *Heredia* and the instant case, the non-dispositive issues involve the validity of the indictment. The State respectfully suggests that when these issues have been comprehensively briefed and argued, the interests of justice weigh heavily in favor of treating the

issues on direct appeal. The State therefore urges this court to examine these issues and dispose of them at this stage of the proceeding.

Conclusion

For the foregoing reasons, the State urges the court to grant the Petition to Reargue the within appeal.

Respectfully submitted,

STATE OF RHODE ISLAND

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CERTIFICATION

I hereby certify that on this 9th day of August, 1985, a true and accurate copy of the within MEMORANDUM was served upon DEFENDANT by mailing it to his attorney of record:

JOHN A. MAC FADYEN, III
91 Friendship St.
Providence, RI 02903

/s/ Geraldine A. Nanni

Supreme Court
No. 84-43-C.A.

State

v.

Luigi Manocchio

O R D E R

The petition to reargue is denied.

Entered as an Order of this Court this 19th day of September, 1985.

By Order,

/s/ Beverly A. Clark
Walter J. Kane
Clerk

BEVILACQUA, C.J. did not participate.

The Sixth Amendment to the United States Constitution provides:

> *Rights of the accused in criminal prosecutions.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment provides in pertinent part:

> *§ 1. Citizenship—Privileges and immunities—Due process—Equal protection of laws.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10 of the Rhode Island Constitution provides:

> *§ 10. Rights of the accused in criminal proceedings.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.